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No. 82-585

IN THE

# SUPREME COURT OF THE UNITED STATES

October Term, 1982

ALOHA AIRLINES, INC., Appellant
v.
DIRECTOR OF TAXATION,
STATE OF HAWAII, Appellee

ON APPEAL FROM THE SUPREME
COURT OF THE STATE OF HAWAII

# APPELLANT'S BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM

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Appellant Aloha Airlines, Inc. ("Aloha Airlines") opposes the Motion to Dismiss or Affirm filed by Appellee Director of Taxation, State of Hawaii ("Director"). Most of the subjects touched upon in that motion were discussed in the Jurisdictional Statement previously filed on behalf of Aloha Airlines. Director's motion raises one new item, however, namely the 1982 amendment to the relevant federal statute, 49 U.S.C. § 1513, but his discussion grossly misconstrues the 1982 amendment and, in the process, may leave a distorted picture of the Hawaii state tax system. As a result, Aloha Airlines finds it necessary to comment briefly concerning the 1982 legislation and to observe in addition that the premise of the Director's entire presentation, including his characterization of the 1982 amendment, is based on a plainly mistaken reading of 49 U.S.C. § 1513.

## 1. THE DIRECTOR'S MOTION IS PREMISED ON AN ERRONEOUS READING OF 49 U.S.C. § 1513.

The Director's misunderstanding of the federal statute is apparent from his statement of the "Question Presented." As stated on page 1 of his Motion to Dismiss or Affirm, he perceives the question to be:

> Whether a Hawaii tax is a property tax or a gross receipts tax. If it is property tax, it is expressly permitted by 49 U.S.C. § 1513(b); and if it is a gross receipts tax, it is expressly prohibited by 49 U.S.C. § 1513(a).

The Director's characterization of the question is wrong because 49 U.S.C. § 1513 provides no basis for such an "either-or" approach. Subsection (a) of the statute prohibits a State from levying a tax on gross receipts derived from the carriage of persons traveling in air commerce or on the sale of air transportation, an interpretation the Director does not dispute. Contrary to the Director's statement, however, subsection (b) does not "expressly permit" anything termed a "property" tax. Rather, subsection (b) states, in relevant part:

> Nothing in this section shall prohibit a State . . . from the levy or collection of taxes *other than those enumerated in subsection (a) of this section*, including property taxes, net income taxes, franchise taxes, and sales or use taxes on the sale of goods or services . . . (emphasis added)

The prohibition stated in subsection (a) is controlling, and nothing in subsection (b) authorizes a State to apply a tax on gross receipts merely by labelling it a "property" tax.

Indeed, the Director's proposed reading of the federal statute would make no sense, since it would exalt the label given to a tax without regard to its actual nature or impact. The Director himself criticizes, at page 6 of his motion, an approach that turns on a "magic word or label." Yet that is precisely what the Director is arguing for. The nature of the Director's misconception is made clear in his statement on page 7 of his motion that the Hawaii legislature could "validate" the tax under 49 U.S.C. § 1513, even if this Court rules here in favor of Aloha Airlines, merely by "amend[ing] the tax to clearly state that the tax is levied on property." Surely Congress could not have intended to make it so easy to evade the federal statute. The Director's view is inconsistent with both the language and the logic of the federal statute, and that is why review and reversal by this Court is necessary.

## 2. THE DIRECTOR'S DISCUSSION OF THE 1982 AMENDMENT TO 49 U.S.C. § 1513 IS MISLEADING.

On September 3, 1982, 49 U.S.C. § 1513 was amended by section 532 of the Tax Equity and Fiscal Responsibility Act of 1982 (Pub. L. 97-248, 96 Stat. 324), Title V of which is the Airport and Airway Improvement Act of 1982 (96 Stat. 671-702). The principal change was the addition of a new subsection (d). In addition, the language of subsection (b) was slightly modified to reflect the addition of subsection (d). The full text of 49 U.S.C. § 1513, including the 1982 amendment, is reprinted in the appendix to this brief.

Even the Director concedes, as he must, that the 1982 amendment does not apply to tax years prior to the date of enactment, September 3, 1982. Since this case expressly concerns tax years 1974 through 1977, it simply cannot be true, as the Director asserts, that the question raised by this litigation is "moot." Nor does the 1982 legislation give reason for deeming the question posed here insubstantial, since the interpretation for several prior years (at least 1974 through mid-1982) would remain at issue, with many millions of dollars at stake for Aloha Airlines and for other airlines and States interested in the same question.

More broadly, the Director is simply wrong in the conclusion which he tries to draw from the amendment. It does not, as he claims on page 9 of his motion, "show that permitted property taxes include the Hawaii tax." That view rests on a clear misreading of the federal statute and upon a misleading characterization of Hawaii taxes.

To begin with, in his reading of the 1982 legislation the Director persists in the faulty premise discussed above. Subsection (a) of the statute is entirely unaffected by the amendment, and the relevant language in subsection (b) is unaltered, as well. The relationship between those two provisions, therefore, and in particular the subordination of subsection (b) to subsection (a), remains unchanged. Nothing in the 1982 legislation authorizes a tax on gross receipts which operates under the guise of a "property" label.

Instead, the change in the statute is the addition of subsection (d), which identifies specific State taxes which are forbidden by Congress as unreasonably burdensome on interstate commerce. Subsection (d) does not modify or alter in any way the prohibition against a tax on gross receipts stated in Subsection (a). Indeed, part of subsection (d) might even serve as a second and additional provision to forbid the application of Hawaii's tax in future years. The relevant portion of 49

U.S.C. § 1513(d) states as follows:

> (1) The following acts unreasonably burden and discriminate against interstate commerce and a State, subdivision of a State, or authority acting for a State or subdivision of a State may not do any of them:
>
> . . .
>
> (C) levy or collect an ad valorem property tax on air carrier transportation property at a tax rate that exceeds the tax rate applicable to commercial and industrial property in the same assessment jurisdiction.

As observed in Aloha Airlines' Jurisdictional Statement, page 8, footnote 4, Hawaii does not have a personal property tax today, did not have one in 1962 when the Hawaii tax statute at issue here was enacted, and has not had one since 1947.[1] In comparison with "the tax rate applicable to commercial and industrial property in the same assessment jurisdiction," which is zero, any so-called "property" tax applied to the airlines is obviously larger, so it would seem contrary to the 1982 legislation.

The Director attempts to claim otherwise in his motion by arguing, on page 10, that the Hawaii tax "is clearly non-discriminatory as the tax is levied equally upon all Hawaii public service carriers." But that is the wrong comparison, and the 1982 amendment expressly says as much. The relevant portion of § 1513(d)(2) states:

> (2) In this subsection—
>
> . . .
>
> (D) "commercial and industrial property" means property, *other than transportation property* and land used primarily for agricultural purposes or timber growing, devoted to a commercial or industrial use and subject to a property tax levy; . . . (emphasis added)

The proper comparison is not with motor carriers, as the Director suggests, but rather with other commercial and industrial property. Since there is no personal property tax applicable to such other property, the application of any tax of this sort on an airline would be

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[1] As was also noted in footnote 4 of the Jurisdictional Statement, the Hawaii public service company tax at issue here is, by its own terms, "in lieu of the tax imposed by Chapter 237 but is not in lieu of any other tax." Haw. Rev. Stat. § 239-6. Chapter 237 is a general excise tax, collected as a percentage of gross income. It is not a personal property tax.

antithetical to the sense of the 1982 amendment. It certainly cannot be justified by it.[2]

## CONCLUSION

The Director's motion should be denied, probable jurisdiction should be noted, and the judgment of the Supreme Court of Hawaii should be summarily reversed.

Respectfully submitted,

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[2]The Director's discussion, at page 9, also includes a statement that the 1982 amendment "further provides that property taxes measured by gross receipts may levy a higher tax burden against airline property so long as the tax is wholly used for airport purposes." That interpretation of § 1513(d)(3) is uncertain, but need not be discussed here because it is entirely irrelevant to this case. Any implication of the Director notwithstanding, the revenue from this tax goes to the general fund of the state treasury, and its use is not limited to airport purposes. Hawaii's airports are financed from airport use charges and rentals separate from this tax. Between 1974 and 1977 Aloha Airlines paid use charges totalling approximately $1,367,000.00. (Stipulation of Facts, Record on Appeal to Supreme Court of Hawaii, at 30-31.)

[3]Except for a wholly owned subsidiary, Aloha Airlines, Inc. has no parent companies, subsidiaries, or affiliates.

## APPENDIX

49 U.S.C. § 1513

(As amended, September 3, 1982—
1982 additions are in italics)

(a) No State (or political subdivision thereof, including the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the District of Columbia, the territories or possessions of the United States or political agencies of two or more States) shall levy or collect a tax, fee, head charge, or other charge, directly or indirectly, on persons traveling in air commerce or on the carriage of persons traveling in air commerce or on the sale of air transportation or on the gross receipts derived therefrom; except that any State (or political subdivision thereof, including the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the District of Columbia, the territories or possessions of the United States or political agencies of two or more States) which levied a tax, fee, head charge, or other charge, directly or indirectly, on persons traveling in air commerce or on the carriage of persons traveling in air commerce or on the sale of air transportation or on the gross receipts derived therefrom prior to May 21, 1970, shall be exempt from the provisions of this subsection until December 31, 1973.

(b) *Except as provided in subsection (d) of this section,* nothing in this section shall prohibit a State (or political subdivision thereof, including the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the District of Columbia, the territories or possessions of the United States or political agencies of two or more States) from the levy or collection of taxes other than those enumerated in subsection (a) of this section, including property taxes, net income taxes, franchise taxes, and sales or use taxes on the sale of goods or services; and nothing in this section shall prohibit a State (or political subdivision thereof, including the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the District of Columbia, the territories or possessions of the United States or political agencies of two or more States) owning or operating an airport from levying or collecting reasonable rental charges, landing fees, and other service charges from aircraft operators for the use of airport facilities.

(c) In the case of any airport operating authority which—

(1) has an outstanding obligation to repay a loan or loans of amounts borrowed and expended for airport improvements;

(2) is collecting without air carrier assistance, a head tax on passengers in air transportation for the use of its facilities; and

(3) has no authority to collect any other type of tax to repay such loan or loans,

the provisions of subsection (a) of this section shall not apply to such authority until December 31, 1973.

*(d)(1) The following acts unreasonably burden and discriminate against interstate commerce and a State, subdivision of a State, or authority acting for a State or subdivision of a State may not do any of them:*

*(A) assess air carrier transportation property at a value that has a higher ratio to the true market value of the air carrier transportation property than the ratio that the assessed value of other commercial and industrial property of the same type in the same assessment jurisdiction has to the true market value of the other commercial and industrial property;*

*(B) levy or collect a tax on an assessment that may not be made under subparagraph (A) of this paragraph; or*

*(C) levy or collect an ad valorem property tax on air carrier transportation property at a tax rate that exceeds the tax rate applicable to commercial and industrial property in the same assessment jurisdiction.*

*(2) In this subsection–*

*(A) "assessment" means valuation for a property tax levied by a taxing district;*

*(B) "assessment jurisdiction" means a geographical area in a State used in determining the assessed value of property for ad valorem taxation;*

*(C) "air carrier transportation property" means property, as defined by the Civil Aeronautics Board, owned or used by an air carrier providing air transportation;*

*(D) "commercial and industrial property" means property, other than transportation property and land used primarily for agricultural purposes or timber growing, devoted to a commercial and industrial use and subject to a property tax levy; and*

*(E) "State" shall include the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the District of Columbia, the territories or possessions of the United States, and political agencies of two or more States.*

***(3) This subsection shall not apply to any in lieu tax which is wholly utilized for airport and aeronautical purposes.***

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